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In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 466.

Miscellaneous.

AUGUSTIN YOUNG,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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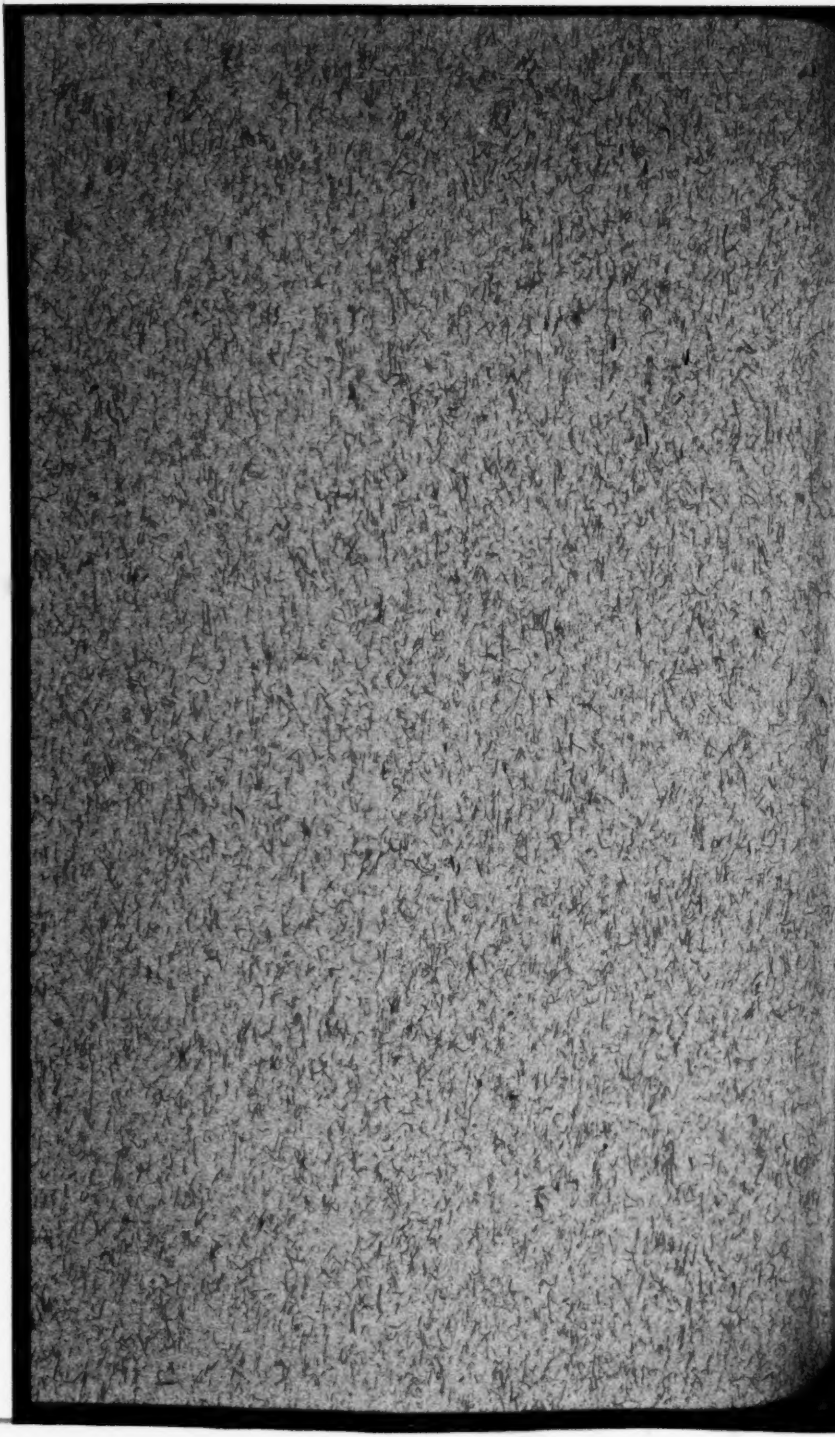

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF QUESTION PRESENTED.

The question presented is whether under the Federal Employers' Liability Act the petitioner has a cause of action against his employer for injuries sustained from an assault made upon him by another employee, regardless of whether the employer had knowledge of a dangerous and vicious disposition of the assaulting employee, and thereafter retained him in its employ, unless, at the time of the assault the assaulter was acting in the course of the discharge of his duties and in furtherance of the work of his employer's business.

The purported question presented by petitioner in his brief, page 6, begs the question because it recites that the assault was committed "during the course of his employment."

The record presents a far different picture of the facts than that claimed by the petitioner. Johnson, the man whom the petitioner Young was to relieve, had worked one trick and Young the succeeding trick for a full year before

the altercation occurred which is the basis of this action. So that it can not be said that they had but a casual acquaintance. As recited on page 2 of petitioner's brief, they got along "all right."

The only two witnesses who gave any testimony regarding altercations with Johnson were Burrell, who made no claim that he reported the matter to any superior, and Harry Sanders, a man who was discharged by the railroad for an habitual violation of the so-called rule G against use of intoxicants, who undertook to tell of a number of incidents between Johnson and other employees. When you read Superintendent Crotser's testimony (R. pages 124-159), you will understand that only by Sander's begging and by promising no further misconduct was he kept employed; that Sander's habits finally led to the breaking up of his home and to the necessity of discharging him, a far different picture than the silly and baseless explanation he gave that the railroad had no power to discharge him unless he got drunk.

Sanders may as well have claimed that he became intoxicated in order to persuade his wife to divorce him.

Superintendent Crotser absolutely denied any reports were made to him regarding Johnson being a dangerous character. Johnson's scalp was split in the fight; he was taken to the hospital and had nine stitches taken in his scalp. Young and Johnson each claimed the other to be the aggressor in the fight. No one else was present.

An investigation was conducted on December 3, 1943, at which representatives of the railroad and of the union to which both Johnson and Young belonged were present, and Johnson was examined. Among those present were the witness Crotser, then Chief Train Dispatcher, and the local Chairman of the union. Another investigation was conducted on March 28, 1944, at which Young was examined, the same representatives of the railroad and of the union were present. These two investigations cover 22

pages of the record beginning at page 160. The union's representative had the right to examine, if he chose. There is not one word contained in these examinations with reference to any prior record of altercations between Johnson and other employees. Defendant sought to show that equal disciplinary measures were imposed upon both Johnson and Young, but the Court ruled the evidence inadmissible. (Record, bottom 136-137.)

ARGUMENT.

1. The instant case is controlled by the holding in Davis vs. Green, 260 U. S. 349.

Mr. Justice Holmes' concise opinion in *Davis vs. Green* commented, page 351:

> *"The ground on which the railroad company was held was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act, done to satisfy the temper or spite of the engineer.* Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. **The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey,—in other words, that he did a wilful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondeat superior applies."** (Emphasis supplied.)

To the same effect is *Atlantic Coast Line R. Co. vs. Southwell,* 275 U. S. 65; *St. Louis-San Francisco Ry. Co. vs. Mills,* 271 U. S. 344, and *Ry. Co. vs. Green,* 279 U. S. 821.

2. The holding of this Court in Lillie vs. Thompson, 332 U. S. 459, did not modify or overrule the doctrine of Davis vs. Green and the other cases following it.

Nowhere in the *Lillie* decision itself is there any reference to the *Green, Southwell* and *Mills* decisions and the per curiam did not modify, criticize, let alone overrule their doctrines. It is proper to say that the brief filed by Mrs. Lillie's counsel in the Supreme Court of the United States made absolutely no claim that the *Davis, Southwell* and *Mills* cases were founded upon an application of the doctrine of assumption of risk, and quite the contrary to counsel's position in this case they urged that the *Green, Southwell* and *Mills* decisions stood upon their own basis and were differentiated from the facts pleaded in the *Lillie* case. As we analyze the *Lillie* case, the fact that the assault was that of a third person rather than that of an employee, tends to strengthen the doctrine of *Davis v. Green* rather than weaken it as urged by petitioner's counsel.

In order to appraise the *Lillie v. Thompson* holding, we desire to comment regarding the decision in the Supreme Court of Miss. in the *Davis vs. Green* case, then known as *Hines, Agent vs. Green,* 125 Miss. 476.

The opinion of Judge Ethredge dealt at length with the doctrine of assumption of risk, pointing out that under the FELA the doctrine applied where the servant injured knew and appreciated the risk and voluntarily continued in the employment after such knowledge, with promise on the part of the master to remedy the condition. Under the State law, if the master is negligent, the servant does not assume the risk. He later, at page 497, pronounced that the facts did not bring the case within the FELA.

At page 493, the opinion states that the Director General of Railroads relied principally upon the case of *Hines, Director General, vs. Cole,* 123 Miss. 254, 85 Southern 199, in which the Supreme Court of Miss. held "That the em-

ployees in that case were not in furtherance of the master's business and that the quarrel was of a private character." The syllabus in the *Cole* case is "The master is not liable for the wrongful assault by one servant on another, unless the servant, in making the assault, was acting within the scope of his employment, with a view to his master's business." Judge Ethredge then stated that the converse of that rule was also true and held that the assaulting employee was engaged in the furtherance of the master's business at the time of the altercation with Green.

Hence it is clear that this Court in *Davis vs. Green* decided the Miss. Court was wrong in its conclusion that the assault was committed in furtherance of the master's business, and wrong in deciding, as a matter of law, that FELA did not apply. **And without ever mentioning the term "assumption of risk" held that whatever might be the law of Miss., the Railroad was not liable under the laws of the United States.**

In order further to analyze the scope of *Lillie vs. Thompson,* we call the Court's attention to the fact that in recent years and since the 1939 Amendment of the FELA, this Court has in three cases, important to consider, sustained judgments for defendants rendered in the District and Circuit Courts. In each of those cases the motions to certify were granted and the judgment affirmed.

The first is *Brady, Admx., vs. So. Ry.,* 320 U. S. 476 (1946). A derailer was claimed not to have been equipped with a proper light and a claim of negligent switching movement was urged. The Court held, page 483, that the rule of the Federal Courts with reference to a directed verdict is applicable to questions of proximate cause. Mr. Justice Reed's closing sentence of the majority opinion is "The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events." *Comment*: The intervening act which in any event broke the chain of reasonably foreseeable events in our case was Young's tardiness and

the consequent engagement in personal altercation with Johnson.

The second case is *Hunter vs. Tex. Elec. Ry.*, 332 U. S. 827. The lower court decision in this case is found in 194 S. W. (Texas) (2nd) 281. A motorman ran contrary to his time card and was injured in a collision. Curiously the State Supreme Court based its reasoning upon cases decided prior to the 1939 Amendment of FELA, these cases being the group that treated plaintiff's negligence as the "sole efficient cause" of the accident. A directed verdict by the lower court was sustained by this Court on November 24, 1947, the very day upon which it announced its decision in the *Lillie* case.

The third case is *Eckenrode vs. Penn. R. Co.*, 335 U. S. 329, decided Nov. 15, 1948, subsequent to the *Lillie* decision. Eckenrode, a brakeman, ran in front of an engine which was moving up grade upon slippery rail for the purpose of throwing additional sand upon the rails. The engine had been slipping badly, and the engine crew knew of Eckenrode's activity. The District Court set aside a verdict for the plaintiff, 71 Fed. Supp. 764, the Third Circuit affirmed, 164 Fed. (2nd) 996, and this Court affirmed.

O'Connell, J., of the Circuit Court dissented and cited Lillie vs. Thompson as authority. Notwithstanding, this Court, in its decision, made no mention of the Lillie case.

In another case in which this Court reversed the judgment of a lower court and entered judgment for the defendant, the *Lillie* case was again urged as authority. *Reynolds, Admx., vs. Atl. Coast Line,* 336 U. S. 207, decided Feb. 14, 1949. A trainman ordinarily gave signals from the top of the sixth car from the caboose. But on account of an obstruction from view claimed to be negligently permitted by the railroad, he, in attempting to pass from the sixth to the seventh car, fell between them and was killed. This Court held the directed verdict was proper.

In still another case of significance, *Anderson vs. A. T. & S. F.*, 333 U. S. 821 (and of course decided since the *Lillie* case), a conductor fell from a rear vestibule, his absence was known to other trainmen. They failed to take prompt efforts to rescue him and he died of exposure. The *Lillie* case was cited, and this Court held in favor of the plaintiff for the reason that the question of the failure to take precautions with respect to a known existing danger could be found to be negligence.

Now, in no single one of these cases was there any discussion of, nor attempt to differentiate the holdings of *Davis vs. Green, Atl. Coast Line vs. Southwell* from the *Lillie* case. In other words, as in the *Lillie* case this Court, by its footnote, gave full recognition to the doctrine of the cases cited in the footnote without in any way modifying or impairing their scope. Certainly if there were any disposition upon the part of the Court to broaden the plain effect of the *Lillie* decision, that opportunity was distinctly offered the Court in the *Eckenrode* and *Anderson* cases, and was disregarded.

The statement on page 6 of petitioner's brief that this is the first case of this character to reach this Court since the *Lillie* case, is thus far from the fact.

For further example, in *Osment vs. Pitcairn*, 349 Mo. 137, 159 S. W. (2) 666, the Sup. Court of Mo. reversed the lower court and entered judgment for the defendant, the railroad company, upon the authority of *Davis vs. Green* where the defendant had knowingly kept in its employ a big, strong young man who had known propensities of getting into altercations with other employees, attacking them from behind, and where in the particular instance, a railroad policeman, witnessing an unprovoked assault by the strong boy, made no effort to control him or prevent him from injuring the plaintiff.

Petition for writ of certiorari was first denied for want of jurisdiction 317 U. S. 587, and later for want of a reviewable judgment, 320 U. S. 792.

On May 2, 1949, the United States Court of Appeals for the Seventh Circuit in the case of *Hoyt vs. Thompson,* 174 Fed. (2) 284, decided a case upon the authority of *Davis vs. Green, Sheaf vs. M. St. P. & S. S. M. Ry. Co.,* 162 Fed. (2) 110.

On May 10, 1949, the United States Court of Appeals for the Second Circuit in the case of *Smith vs. Lehigh Valley R. Co.,* 174 Fed. (2) 592, gave sanction to the *Davis vs. Green* and *Sheaf* cases, and commented on the *Brady, Admx., vs. So. Ry. Co.* and other cases.

In *Lavender vs. Ill. Central R. Co.,* 1949, 358 Mo. 1160, 219 S. W. 2nd, 353, the Supreme Court of Missouri dealt with the fatal shooting of one employee waiter by another. The Court affirmed a judgment of the lower court for the defendant. Plaintiff relied on *Lillie vs. Thompson,* 332 U. S. 459; *Lavender vs. Kurn,* 327 U. S. 645, and *Anderson vs. Atchison, T. & S. F. R. Co.,* 333 U. S. 821.

But the court said, p. 358:

> "The facts of those cases so clearly and quickly distinguish them that it is unnecessary to point to distinguishing features. In each case the railroad clearly required the employee to work in a hazardous place, which, under the existing circumstances, the Court held to be obviously an unsafe place in which to work."

Motion to certify, No. 160, was denied by this Court October 10, 1949, 338 U. S. 822, and rehearing denied November 14, 1949, 338 U. S. 881.

In the Ohio Courts the petitioner placed great emphasis upon an argument that because the FELA amendment of 1939 had abolished the defense of assumption of risk, that the decision in *Davis vs. Green* had been destroyed, arguing that because the Mississippi Court had based its decision upon a consideration of the doctrine of assumption of risk, in some manner Mr. Justice Holmes' opinion had been diluted!

This contention is still made (see petitioner's brief, bottom page 6 and the discussion of *Davis vs. Green* beginning at the bottom of page 10.)

We have examined the briefs in *Lillie vs. Thompson* and nowhere in it is there the slightest reference to the doctrine of assumption of risk and to any differentiation of the Court's holding in that case from the holding in *Davis vs. Green* as resting upon the abolition of the defense of assumption of risk.

The sole basis of Justice Holmes' opinion in *Davis vs. Green* is that the tortious act complained of was not committed in the furtherance of the master's business or within the scope of the assaulter's employment. Under no process of reasoning, therefore, could the doctrine of assumption of risk have had any part in the decision. For if the master was in no event liable he would never need to assert that the injured employee assumed the risk of a tort not attributable to the master. This simple analysis should show how utterly false plaintiff's argument is.

CONCLUSION.

It seems clear to us from a careful consideration of petitioner's claims and of the authorities presented that the theory of petitioner's case is sheer fiction and invention and an attempt to read into Jutice Holmes' opinions a meaning not expressed or hinted at therein. Certainly Justice Holmes needed no help for clarity of expression. As is recognized by the opinion of our Court of Appeals, the *Davis vs. Green* opinion was not predicated upon the doctrine of asumption of risk. Neither was the *Lillie* decision in the Supreme Court based upon the abrogation of the doctrine of assumption of risk. Nowhere in the numerous cases decided by this Court since the 1939 Amendment and in the several cases decided by it subsequent to its decision in the *Lillie* case, has there been the slightest reference to the doctrine of assumption

of risk. Neither was there any pronouncement, definite, indefinite, inferential, or conjectural by this Court in any case decided by it, including the *Lillie* case, that the doctrine of *Davis vs. Green* has been modified or destroyed.

Such an authoritative digest as Shepard's treats *Davis vs. Green* as distinguished from the *Lillie* decision.

It is perfectly clear from the opinion of the Sixth Circuit Court in the second appeal in the *Lillie* case that they were dealing with "a safe place to work" as a physical thing, the place in which people worked. It certainly begs the question for counsel to suggest that the Circuit Court of Appeals which decided the *Sheaf* case, and The Ohio State Court of Appeals in deciding the instant case, did not comprehend what they were doing. Such an assertion of necessity suggests the claim that this Court as well did not know what it was doing when it had a provoked opportunity to overrule or modify the *Davis vs. Green* doctrine in its decision in the *Lillie* case, and in its opinions in the *Eckenrode* and *Anderson vs. A. T. & S. F.* cases, and did not do so.

For the convenience of the Court there is printed herein as appendix A the opinion of the Court of Appeals of Ohio (the only opinion handed down by any of the Ohio Courts). In order to understand the discussion of *Sheaf vs. Minn. St. P., & S. S. M. Railroad,* 162 Fed. 2nd 110 contained in that opinion, it needs to be stated that in the Ohio Courts petitioner argued that the decisions of the Courts in Jones Act cases had in effect modified or destroyed the doctrine of *Davis vs. Green.*

That argument is not presented to this Court.

Were the *Davis vs. Green* doctrine to be overturned and the rule established as contended for by plaintiff, it would compel management of industry to screen millions of workers in an attempt to learn the nature and volatility of their tempers and to psychoanalyze their human characteristics. It would mean that if it be shown the master had

knowledge of a single incident in which a workman either in temper or completely maliciously attacked another workman, that it could be urged that in the exercise of ordinary care the master should have discharged that workman in order to afford other workmen a "safe *place* in which to work." This is an obvious absurdity.

Respectfully submitted,

J. Paul Lamb,

Counsel for Respondent.

APPENDIX A.

Opinion of the Court of Appeals.

No. 21,232.

IN THE COURT OF APPEALS OF STATE OF OHIO

CUYAHOGA COUNTY, EIGHTH DISTRICT.

AUGUSTIN YOUNG,
Plaintiff-Appellant,

vs.

NEW YORK CENTRAL RAILROAD CO.,
Defendant-Appellee.

OPINION.
July 18, 1949.

APPEARANCES:

For Plaintiff-Appellant:
PAYER, BLEIWEISS, CROW & MOLLISON.

For Defendant-Appellee:
J. PAUL LAMB.

HURD, *J.*

This case sounding in tort originated in the Common Pleas Court of Cuyahoga county where the appellant, Augustin F. Young, a railroad signalman brought his action under the Federal Employers Liability Act against the appellee. The New York Central Railroad Company, his employer, for damages for personal injuries sustained by him as the result of an alleged unprovoked attack made upon him by a fellow worker.

At the close of all the evidence, the court granted defendant's motion for a directed verdict and rendered judgment thereon. Whereupon a motion for new trial

having been overruled, an appeal was perfected to this Court on questions of law.

The parties will hereinafter be designated as 'plaintiff' and 'defendant' as they appeared in the trial court.

The gravamen of plaintiff's complaint is that the defendant was negligent in retaining in its employ a dangerous and vicious man with knowledge of these propensities and characteristics and in failing to provide plaintiff with a safe place to work.

While the record shows a conflict in respect of the facts of the altercation which led to the assault, the trial court for the purposes of the motion to direct a verdict, was obliged to accept as true the evidence of the plaintiff and also to construe it most favorably to plaintiff and in this Court, upon this appeal, the plaintiff is entitled to the most favorable interpretation of the facts in his favor and all inferences which may reasonably be drawn therefrom.

A brief summary of the evidence interpreted most favorably to the plaintiff, is as follows:

Plaintiff, Young, 50 years of age, married and the father of four children, had been employed by defendant, The New York Central Railroad Company, continuously since he was 19 years of age, as a tower-man or signalman. His duties required him to give signals with respect to the right of way at the intersection of several railroad lines through the pulling or operating of certain mechanical levers.

During the year 1943, he was assigned to what is known as the C & P crossing at the old Union Depot, Cleveland, Ohio, where the Pennsylvania railroad tracks intersect with tracks of the New York Central Railroad. At the time of the matters complained of, his working shift covered the period from 11 o'clock P. M. until 7 o'clock A. M. He reported to and performed his duties in a small shanty 5′ x 9′ containing a small stove, a clothes locker, a telephone and a small desk. Each night he relieved one James John-

son, the person who assaulted him, who was the lever-man at this shanty on the shift which commenced at 3 o'clock P. M. and terminated at 11 o'clock P. M. Prior to the night of Nov. 29, 1943, when the alleged wanton and unprovoked attack was made, plaintiff had only a casual acquaintance with Johnson.

Plaintiff testified that Johnson and he had no physical encounters and no words and no trouble of any sort during the year that Young relieved Johnson prior to the night of Nov. 29, 1943, except that he had reported late a few times in relieving Johnson; on one occasion about 45 minutes late, and on another occasion about one minute late, and on the night of the attack he reported about four minutes late. He testified that on the occasion when he was 45 minutes late he paid Johnson 60¢ in cash to compensate him for the overtime service, but otherwise they had no trouble at all and they "got along all right."

On the night of Nov. 29, 1943, plaintiff's automobile developed a flat tire enroute to work, and he arrived about four minutes after 11 P. M. Johnson was waiting outside the shanty as Young appeared. According to Young's testimony, he apologized for being late and he explained he had trouble with his automobile and thereupon he proceeded to the shanty with Johnson following him. As plaintiff was removing his jacket, Johnson shouted "I warned you not to come late * * * hurry up now, get to work." Johnson reached for plaintiff's jacket and appeared to be attempting to pull it off. What appeared to be a mere jerking by Johnson of plaintiff's jacket, was, according to plaintiff's testimony, in fact repeated stab wounds in his chest and abdomen. In the struggle which ensued, the plaintiff was severely cut and stabbed in the region of his cheek, abdomen and legs. According to plaintiff's testimony, he was able to save his life by striking Johnson several blows with a stove poker and thereupon he escaped from the shanty and called a Pennsylvania railroad crew nearby for help. Plaintiff was hospitalized for a number of

days under oxygen and underwent two operations. He was confined to a hospital for one month and at home in bed another month. He returned to work in April, 1944, and is now employed in the same position by the defendant company.

Plaintiff introduced evidence of prior assaults, upon other employees of the company by Johnson, about seven or eight in number, and introduced testimony showing that repeated reports had been made concerning Johnson's conduct in this respect, to the wire dispatcher and to Supt. Crotser, both of whom were his and Johnson's superiors and persons in authority to whom such reports should have been addressed. While it was denied by Supt. Crotser that he had received any reports about Johnson's misconduct, nevertheless, for the purpose of this review, we must, as stated, assume that notice was brought to the company concerning the previous course of Johnson's conduct as indicated by the incidents described in the evidence.

As we view this case, the principal question presented is whether the facts shown in the record interpreted and construed most favorably to plaintiff, are sufficient to establish liability of the railroad company under the Federal Employers Liability Act. The pertinent and applicable provision of the Act is as follows:

> "Every common carrier by railroad, while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier. * * *." U. S. C. A. Sec. 51.

From the foregoing, it is clear that under the Federal Employers Liability Act liability arises from negligence and the burden rests upon plaintiff to prove that the negligence of the railroad company was in whole or in part a proximate cause of the injury for which recovery is prayed.

Cases involving circumstances similar to those of the instant case have heretofore been considered and decided by the Federal Courts and the interpretation placed upon the Federal Employers Liability Act by such decisions must be followed by this Court in the instant case insofar as they are applicable.

In the case of *Davis v. Green,* 260 U. S. 349, 43 Sup. Ct. 123, 124 the Supreme Court of the United States reversed the Supreme Court of Mississippi which had affirmed the lower court decision holding the railroad company liable where an employee who was a conductor, had been killed by an engineer, a fellow employee of decedent, where the evidence disclosed that the company had employed a dangerous man with notice of his dangerous propensities.

Mr. Justice Holmes, speaking for the court, said:

> "The ground on which the railroad company was held was that *it had negligently employed a dangerous man with notice of his characteristics and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and willful act done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States.*" (Emphasis added.)

To the same effect is the later decision of the United States Supreme Court in the case of *Atlantic Coast Line Railroad vs. Southwell,* 275 U. S. 265, 48 Sup. Ct. 25, which involved similar facts.

The following cases follow the same reasoning: St. *Louis San Francisco Railroad vs. Mills,* 271 U. S. 344 (1926); *Atlanta & Charlotte Air Line Railroad vs. Green,* 279 U. S. 821 (1929), reversing per curiam 151 S. C. 1, 148 S. E. C. 633.

Counsel for plaintiff apparently recognizing the force of the foregoing decisions argue that these cases were de-

cided prior to 1939 at which time the Federal Employers Liability Act was amended in such a manner as to abolish the defense of voluntary assumption of risk and that therefore these cases have no application to facts such as are disclosed by the record in the instant case.

In our opinion, this contention cannot be sustained because in the cases cited the Supreme Court did not predicate its decisions on the defense of assumption of risk. The gist of these decisions is generally to the effect that the railroad company is not liable unless the attack or act complained of was done to further the railroad company's business even though the act may have occurred in the course of the actor's employment.

In our opinion, the attack made upon the plaintiff in the instant case could not be considered as an act in furtherance of the employer's business on the most liberal interpretation in favor of the plaintiff. On the contrary, the facts in the present case show a wanton, malicious, unprovoked attack done "to satisfy the temper or spite" of the fellow employee.

Plaintiff places great reliance upon the recent case of *Lillie vs. Thompson, Tr.*, 332 U. S. 459. In that case a per curiam opinion of the Supreme Court reversed the District Court and the Circuit Court of Appeals which had affirmed the decision of the District Court, dismissing the petition of plaintiff for failure to state a cause of action. The court said in part:

> "Petitioner's allegations may be summarized as follows: Respondent required her, a 22 year old telegraph operator, to work alone between 11:30 P. M. and 7:30 A. M. in a one-room frame building situated in an isolated part of respondent's railroad yards in Memphis. Though respondent had reason to know the yards were frequented by dangerous characters, he failed to exercise reasonable care to light the building and its surroundings or to guard or patrol it in any way. Petitioner's duties were to receive and deliver messages to

men operating trains in the yard. In order for the trainmen to get the messages, it was necessary for them to come to the building at irregular intervals throughout the night and it was petitioner's duty to admit them when they knocked. Because there were no windows in the building's single door or on the side of the building in which the door was located, petitioner could identify persons seeking entrance only by unlocking and opening the door. About 1:30 A. M. on the night of her injury petitioner responded to a knock, thinking that some of the respondent's trainmen were seeking admission. She opened the door and before she could close it a man entered and beat her with a large piece of iron, seriously and permanently injuring her.

In support of his motion for summary judgment, respondent alleged and petitioner did not deny that the assailant was not an employee of respondent and that the attack was criminal. We are of the opinion that the allegations of the complaint, if supported by evidence, will warrant submission to a jury. Petitioner alleged in effect that respondent was aware of the physical conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal misconduct, is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

When the case was remanded to the district court, the jury returned a verdict for plaintiff in the sum of $7500.00. The appellee entered a motion for judgment notwithstanding the verdict, which the court sustained and dismissed the suit. An appeal was had again to the United States Circuit Court of Appeals, Sixth District, which reversed the District Court.

It is obvious, we think, that there is no analogy between the facts of *Lillie v. Thompson,* and the present case. But is there analogy in principle? We think not.

In the second appeal in the *Lillie* case, the Court of Appeals in reversing the second judgment of the District Court, stated as follows:

> "The gravamen of her claim (Lillie) was that appellee ordered her to a place of work which they know, or by the exercise of reasonable care, should have known to have been unsafe and without taking reasonable care for her protection."

The second paragraph of the syllabus (173 Fed. 2d, 481) is as follows:

> "Evidence that railroad superintendent placed female telegraph operator for work at a place which by exercise of *reasonable prudence he should have known as one of peculiar hazard for a female employee, and that thereafter a negro not employed by railroad criminally attacked the operator,* authorized recovery by operator from railroad under Federal Employers Liability Act, for injuries which she sustained. Fed. Employers Liab. Act, Sec. 1, 45 U. S. C. A. 51." (Emphasis added.)

We think that the emphasis in the *Lillie* case is placed, first, upon the fact that plaintiff was a young girl 22 years of age who was criminally attacked under conditions which created a peculiar hazard for a female employee, and second, the fact of the physical condition and location of the building in which she was obliged to work, and third, the fact that her working hours were required to be between 11:30 P. M. and 7:30 A. M., and fourth, in a place which was infested by "thieves, tramps, hoboes and other trespassers." The gist of the decision of the Supreme Court and later the Circuit Court of Appeals on the second appeal, is that by the exercise of reasonable prudence, Thompson, the trustee of the railroad company, should have known the dangers inherent in such a peculiar situation.

The doctrine of the *Lillie* case must, we think, have limited application to cases of a similar factual nature. We cannot agree with the contention of plaintiff that on principle the same issues are involved in that case as in the instant case.

We are further of the opinion that the decision of the Supreme Court in the *Lillie* case has not repudiated, either expressly or impliedly, the doctrine of *Davis v. Green* and following cases of factual analogy.

We find our conclusion in this respect to be in harmony with the case of *Schaef v. Minn. St. P. & S. S. M. Railroad et al.,* decided by the Circuit Court of Appeals 8th District, June 18, 1947, 162 Fed. (2d) 110, syllabus 4 of which is as follows:

> "Where complaint of railroad conductor against railroad under Federal Employers Liability Act, for injuries sustained as a result of alleged unprovoked attack by railroad engineer alleged that engineer had been quarrelsome and vicious person for many years prior to assault and that railroad had knowledge thereof, or by exercise of ordinary care should have known of it and that railroad ratified acts of engineer by retaining him in service, no genuine issue of negligence was stated in complaint such as would preclude summary judgment for railroad. Federal Rules of Civil Procedure Rule 12, 56 U. S. C. A. following Sec. 723-c; Fed. Employ. Liab. Act, Sec. 1, 45 U. S. C. A. Sec. 51."

Neither do we think that the seamen's cases under the Jones Act cited by the plaintiff have application here. We think it unnecessary to review these cases at length as this proposition has been passed upon many times before in decisions of Federal Courts.

As stated in the case of *Schaef v. Minn. St. P. S. S. M. Railroad,* 162 Fed. 2d, 110 at page 114:

> "The appellant argues, however, that the Davis and Southwell cases, *supra,* have been overruled in effect by a more liberal construction of the Act by the Su-

preme Court and the courts of appeal in such cases as Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; Baltimore & Phila. Steamboat Co. vs. Norton, 284 U. S. 408, 52 S. Ct. 187, 76 L. Ed. 366; and Koehler v. Presque Isle Transp. Co., 2 Cir. 141 F. 2d, 490.

These cases are all distinguishable from the Davis and Southwell and other like cases, in that they arose among seamen employed on vessels operating upon navigable waters. In such cases the duties of the employer to its employees are different, giving rise to a broader or more liberal construction of the statutes applicable. This fact was pointed out by Mr. Justice Stone in Socony-Vacuum Oil Co. vs. Smith, 305 U. S. 424, 430, 431, 59 St. Ct. 262, 266, 83 L. Ed. 265, wherein he said:—

> 'The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. * * * Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of common law which would affect them harshly because of the special circumstances attending their calling. (Citations) It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end.' ''

Neither do we think that the doctrine of *respondeat superior* applies as contended by plaintiff. This could only be upon the theory that the assault was committed by Johnson "in furtherance of the master's business." We have hereinbefore stated that under the most liberal construction of the evidence the attack in question cannot be considered "in furtherance of the employer's business."

This is not a case of first impression under federal court decisions. Therefore we are obliged to follow the de-

cisions of the Supreme Court of the United States in cases hereinbefore cited interpreting liability under the Federal Employers Liability Act. The later analogous decisions of Federal Circuit Courts of Appeals which are unreversed and unmodified are likewise persuasive of this view.

We conclude, therefore, that the judgment of the Court of Common Pleas must be affirmed.

Judgment affirmed. Exceptions. Order see Journal.

SKEEL, *P. J.*, concurs.

MCNAMEE, *J.*, concurs in judgment.